THE MORNING APPEAL.

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SUNDAY.....APRIL 7

A. That wasn't very deep.

Q. How deep was the snow in the country adjacent to the opening of the culvert, on the level?

A. It was between four and five feet I should judge.

Q. I wish you would describe the appearance of what you call this elevation, or deposit of snow near the opening of the culvert.

A. Well, on each side of the track there is a rounding where the snow apparently fell on the track, that is it was shoved off by the snow plow I should judge.

Q. Did it have the appearance of a snow drift or a deposit from the track?

A. It had the appearance of being shoved off the track.

Q. State whether it was loose or compact or heavy?

A. It was kind of compact.

The above is the plaintiff's testimony from short hand notes of the case, vouched for as correct by plaintiff's attorneys. The defendant furnished the APPEAL with no short hand notes of the case other than those published on Thursday. The following is Judge Hawley's decision, and printed in full, as it deals with a kind of accident which has no precedent in the annals of damage suits on this coast.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

JOHN C. TITUS,
Plaintiff.
vs.
SOUTHERN PACIFIC COMPANY,
Defendant.

Decision of Hon. T. P. Hawley, Judge, on defendant's motion for an instruction to the jury to render a verdict for defendant.

THE COURT: Gentlemen of the Jury, it is proper that I should state to you that when you are excused day before yesterday you were excused for the purpose of having a legal question submitted to the court; and, not knowing what disposition was to be made of it, it was preferred by the Counsel and the Court that the discussion should take place during your absence so that it might not have any influence with the jury till the case should be finally submitted to them.

At that time a motion was made by the Defendant for the Court to instruct the jury to find a verdict for the Defendant. The motion was overruled for reasons which were then stated by the Court, and at the close of the testimony yesterday, when you were excused, the same motion was made by the Defendant upon the whole of the evidence in the case, and it becomes my duty this morning to dispose of that motion.

I ask the jury to pay particular attention to what I may have to say, as it will probably save some trouble in any specific instructions to the jury hereafter.

The Defendant has filed a written motion requesting the Court to instruct the jury to find a verdict for the Defendant. I shall not stop to read the grounds upon which the motion is based, as they are familiar to Counsel; nor do I intend to discuss, in length at least all of the questions or any of them that have been tendered, but shall content myself with a brief statement which will give to Counsel the benefit of whatever views which I personally entertain in regard to some of the points that were discussed.

If this case should be submitted to the Jury, it would be their first duty to determine from the evidence, under the instructions of the Court, whether it has been shown that the Defendant has been guilty of any negligence whatever; whether it has failed to exercise due care in running its snow-plows over its road and over the culvert in question, and, by the want of such care and diligence, caused the injury which the plaintiff received. If this question should be answered in favor of the Defendant, then it would not be necessary for the jury to consider the other questions, as it would be their duty to find a verdict in favor of the Defendant.

Touching this question of negligence on the part of the Defendant, I am of the opinion, under all the facts, circumstances, conditions and surroundings shown by the evidence, that the Defendant, in running its snow-plows over its road and over the culvert in question, was engaged in the performance of a lawful act in the line of duty which it owes to the public in using all reasonable methods to keep its road open and free from snow, and that, in so doing, it affirmatively appears from the evidence that Defendant used due and reasonable care and took such precautions as were ordinarily and reasonably necessary under the exigencies and the conditions existing at the time to avoid any injury to others, and that it cannot, under the principles of law applicable to this case, be held liable for the injury which occurred to the Plaintiff on the 5th day of February, 1893.

I am also of the opinion that the injury which the Plaintiff received belongs to that class of accidents whose occurrence is so rare, unexpected and unforseen that to hold the Defendant responsible for a failure to guard against it is to hold it to the most expensive liability and to cause it to become substantially an insurer against any accident which human care, skill or foresight could prevent. This is a higher degree of responsibility than the law exacts. The very fact that for fifteen or twenty years or more the culvert in which the Plaintiff received his injuries had been in the same condition and that, as appears from the evidence, no similar accident had ever occurred, is a most cogent reason of the lack of any negligence upon the part of the Railroad Company in the failure to guard this particular spot along the line of its road. I think this case comes within the general principle of law that that which never happened before and which in its character is such as not to naturally occur to prudent men to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for the charge of negligence in not forseeing its possible happening and guarding against that remote contingency.

At most the Defendant could only be held responsible for throwing some snow into the culvert, or near the side thereof, or in leaving the top of the culvert partially uncovered so that some snow might fall into the culvert; but in this connection it is shown by the evidence that there were three concurring causes tending to produce an accumulation of snow on each side of the culvert as well as over the bottom thereof: First—The act of Marsden in placing a bridge or plank bottom over the road under the culvert. Second—The high winds which drifted the snow into the north end of the culvert. Third—The running of the snow-plow by Defendant over the track above the culvert, causing more or less snow to be deposited on each side thereof. The rule of law is well settled that, where two or more causes concur to produce an effect and it can not be determined which contributed most largely or whether, without the concurrence of both, it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence, so that it cannot be attributed to that cause which is answerable for it. And I think that this principle is applicable to the facts in this case.

Moreover, if the case was submitted to the jury, and the question of negligence and want of due care was answered against the Defendant, the next question which the jury would be required to consider, under instructions from the Court, would be whether or not the Plaintiff was himself free from fault, whether he failed to exercise due care and, by want of it, contributed to the injury. If the obstructions at the culvert were of such a character that a man of ordinary care and prudence, under the conditions which existed at the time, having knowledge of the obstructions, would not have attempted to pass through the culvert without first examining the same or taking some steps to prevent possible injury, by getting down in the seat in the bottom of the sleigh or otherwise, then the Plaintiff had no right to try the experiment of driving through the culvert at the risk of others without exercising due care on his part.

I am of the opinion that from the undisputed evidence in this case it clearly appears that the Plaintiff was himself guilty of negligence which contributed to the unfortunate injury whih he received.

The Supreme Court of the United States have repeatedly declared that, although the question of negligence and contributory negligence are ordinarily questions of fact to be passed upon by the jury, yet when the undisputed evidence is so conclusive that the Court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict to be returned in accordance with the evidence; and several of the United States Circuit Courts of Appeal have decided that it is the duty of the Circuit Courts to direct a verdict for either party whenever, if under the state of the evidence they would be compelled to set aside a verdict if returned by the jury the other way.

Being of the opnion that the entire evidence in this case, with all of the inferences that the jury could justifiably draw from it, it is insufficient in law to support a verdict for the Plaintiff, it becomes my duty, under the decisions of the Supreme Court of the United States, which are binding upon me, to grant the motion; and in pursuance thereof I now instruct the jury to find a verdict for the Defendant for the reasons which I have just stated.

Fatal Wreck on the C. & C. R. R.

A fatal wreck occurred on the C. & C. R. R. Friday afternoon about three miles West of Wabuska. There were sixteen cars of cattle in train and as the accident occured on level ground it is supposed the cattle crowded onto one side of the car thus throwing it from the track. Charles Noland the brakeman was instantly killed, being found dead under a car of cattle. Eighteen head of cattle were killed.

The mail was brought to Dayton on the engine and the engine immediately returned to the wreck with Coroner Hawkins at Dayton. A Coroners jury was summoned at the wreck and rendered a verdict exonerating the crew and railroad from any blame in connection with the death of young Noland.

$15,000 Damages.

Louis Engler, who sued the Western Union Telegraph Co. for damages caused by his running into a fallen wire, was awarded $15,000 by the jury yesterday.

It was in evidence that the doctor who attended his leg made 400 visits. His expenses were nearly $5,000 to date. The verdict is everywhere approved.

E. S. Farrington appeared for the plaintiff, and Torreyson and Summerfield and Rodgers and Evans of Ogden for the Western Union.

Will Settles in Stockton.

Will Davis and wife left for Stockton last night, where they will make their future home. Mr. Davis learned the typographical trade in the APPEAL office, and there are few compositors on the coast who can surpass him in speed, either in the composing room or job department.

Attempted Burglary.

Last night about 10 o'clock a burglar attempted to enter Mr. Sweetlands shoe shop by the back way. Young Sweetland took two shots at the man who disappeared in Coffin's back yard, and all trace was lost of him in the darkness.

Wilde's Trial.

Oscar Wilde's trial on a charge of sodomy began yesterday in London. The testimony against him was direct and conclusive, but too filthy for print. He is probably booked for a term of years in prison.

Quarterly Meeting at the M. E Church today, at 11 A. M. Service as usual.

Subject: "The Conflict in the Arena" 6:30 P. M. Lovefeast. 7:30 P. M. Preaching by Dr. Van Deventer. At close of Sermon the Sacrament of the Lord's Supper will be administered.

All are invited.

W. J. Mitchell,
Pastor.